

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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CS Docket No. 98-106
FEDERAL COMMUNICATIONS COMMISSION
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In the matter of)
1998 Biennial Regulatory Review)
"Annual Report of Cable Television)
Systems," Form 325, filed pursuant to)
Section 76.403 of the Commission's Rules)

PETITION FOR RECONSIDERATION

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**Before the
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PETITION FOR RECONSIDERATION

Ameritech New Media (Ameritech), pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, petitions for reconsideration of the Commission's report and order in the above-referenced proceeding.¹

I. Introduction and Summary.

Although the Commission's *Form 325 Order* purports to "streamline" Form 325,² it actually significantly expands the reporting obligations of cable operators required to file the form. The new form, for example, would require cable operators to disclose highly sensitive, confidential business information regarding such matters as the number of set-top boxes deployed, the number of cable modem and cable telephony subscribers to a system, and the number of subscribers per optical fiber node.

¹ 1998 Biennial Regulatory Review – "Annual Report of Cable Television Systems," Form 325, filed pursuant to Section 76.403 of the Commission's Rules, CS Docket No. 98-61, Report and Order, FCC 99-13 (rel. Mar. 31, 1999) (*Form 325 Order*).

² Form 325, "Annual Report of Cable Television Systems," was used historically to solicit basic operational information from all U.S. cable television systems, including: the operator's name and address; system-wide capacity and frequency information; channel usage; and number of subscribers.

The Commission added these new reporting obligations without providing any notice that it was contemplating expanding the Form 325 reporting requirements. Indeed, the Commission initiated this proceeding specifically to consider whether to eliminate or streamline Form 325, consistent with its mandate under section 11 of the 1996 Telecommunications Act to repeal or modify obsolete regulatory requirements, because it had not collected Form 325 data since 1994.³ Consequently, interested parties could not reasonably have anticipated that the Commission would expand the data that must be reported on Form 325, nor did they have an adequate opportunity to comment on each of the new reporting requirements adopted, in violation of section 553(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 553(b). Ameritech therefore urges the Commission to set aside the new reporting requirements pending a proper notice and comment rulemaking proceeding to consider the need and statutory basis for such requirements, as well as to consider whether, to the extent such need has been established, cable operators should be permitted to submit such information only on a confidential basis.

II. The Commission Failed to Afford Interested Parties a Reasonable Opportunity to Comment on the New Form 325 Reporting Requirements.

In the *Form 325 Order*, the Commission substantially modified the Form 325 reporting requirements. While the Commission eliminated reporting obligations

³ 1998 Biennial Regulatory Review – “Annual Report of Cable Television Systems,” Form 325, filed pursuant to Section 76.403 of the Commission’s Rules, CS Docket No. 98-61, Notice of Proposed Rulemaking, 13 FCC Rcd 12266, 12268 (1998) (*Notice*) (stating that, since the Commission had not mailed out Form 325 since 1994, it proposed to “either: (1) abolish this data collection process entirely, or (2) reform the process so that the data that is deemed important may be collected in a more efficient, less resource intensive, manner”). See also *id.* at 12266.

altogether for many cable operators⁴ and eliminated certain relatively insignificant reporting requirements for all operators,⁵ it added 12 new, more onerous reporting requirements for those operators required to complete Form 325.⁶ Thus, while the *Form 325 Order* may in some ways reduce the information collection burden on the “industry,” because many systems will not have to file Form 325, it will not reduce the burden on those systems still required to file. Indeed, for those systems, the burden is significantly increased because of the many new items added to Form 325.

The addition of these new reporting requirements is inconsistent with the APA because they were not in any way addressed in the *Notice*. In the *Notice*, the Commission observed that, although section 11 of the 1996 Act does not refer to the cable television rules, it had determined to examine thoroughly all of its regulations (including the cable rules) to repeal or modify obsolete regulatory requirements as part of the first biennial regulatory review.⁷ The Commission further observed that it had not collected Form 325

⁴ The Commission purported to streamline the Form 325 information collection process by reducing the number of cable operators required to complete the form. Specifically, the Commission announced that it would send the form only to the approximately 700 systems with 20,000 or more subscribers and a “sampling” of the approximately 9,800 cable systems with less than 20,000 subscribers. *Form 325 Order* at para. 12.

⁵ By requiring cable operators to report Form 325 data on a system-wide, rather than a community-by-community, basis, the Commission effectively eliminated 12 items from Form 325. Most of these items required verification of simple and unchanging information, such as the name of the community served by a system, the PSID number, the CUID number, the cable system’s employer identification number, and the date when service was initiated to a community.

⁶ Specifically, the *Form 325 Order* required certain operators annually to provide data on the following matters not previously covered by Form 325: the number of subscribers who have set-top boxes and the number of set-top boxes in inventory and deployed (analog, digital, and hybrid); information concerning upstream channel usage (*i.e.*, two-way capability and services); the number of telephony subscribers; the number of cable modem subscribers; the number of leased cable modems deployed; the number of optical fiber nodes in the system; the type of digital modulation method utilized; whether programming is transmitted over the system in analog, digital or HDTV formats; and the tier in which specific programming is carried. *Form 325 Order* at Appendix A.

⁷ *Notice*, 13 FCC Rcd at 12266-67.

data since 1994.⁸ It concluded that it therefore was appropriate “to either: (1) abolish this data collection process entirely, or (2) reform the process so that the data that is deemed important may be collected in a more efficient manner.”⁹

With respect to this narrow proposal, the Commission questioned whether it should still require the type of data reported on Form 325 and whether this information is available from other sources.¹⁰ The Commission further asked whether and how Form 325 should be changed “to obtain more useful consistent or reliable data if the form is retained.”¹¹ The Commission noted in this regard that the questions and instructions on the form had not elicited consistent responses in the past, and that Form 325 did not seek specific ownership information.¹² Thus, the Commission indicated in the *Notice* that it was either going to eliminate Form 325 or, at most, make limited modifications to the questions and instructions on the form to clarify the data to be collected and reform the collection process.

Nowhere in the *Notice* did the Commission suggest that it was contemplating adding a host of new reporting requirements, much less requirements relating to such matters as the deployment of set-top boxes, upstream spectrum (two-way capability), the number of fiber optic nodes within the system and the number of subscribers served from those nodes, the number of telephone and cable modem subscribers, and the number of leased cable modems deployed. Not surprisingly, none of the comments received in

⁸ *Id.* at 12268.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

response to the *Notice* made any reference to these new reporting requirements. Indeed, the only two commenters to support retention of Form 325 simply urged the Commission to continue to collect the information solicited by the existing form; they did not in any way suggest that the Commission should expand the reporting requirements.¹³

The Commission's adoption of the new reporting requirements on Form 325 violates section 533(b) of the APA, which requires the Commission to give notice of "either the terms or the substance of the proposed rule or a description of the subjects and issues involved."¹⁴ The D.C. Circuit has explained that this provision "requires the Commission to provide notice of the proposed rulemaking 'adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.'"¹⁵ The Commission plainly failed to satisfy this requirement here because it gave interested parties no indication that it was considering expanding cable operators' substantive reporting obligations as it did. For this reason, none of the parties to this proceeding commented on whether the Commission has any need for the new data required by Form 325, whether the data are available from another source, whether the Commission's potential need for the data justifies the burden to cable operators of collecting and submitting the data, and whether the data are confidential.¹⁶ The fact that no one

¹³ See the National Association of Broadcasters Comments at 2 (urging the Commission to continue to collect information concerning cable system capacity and usage unless the Commission finds that adequate information is available to the Commission and private parties for purposes of the DTV must carry proceeding); the Institute for Public Representation, *et al.* Comments at 11-12 (urging the Commission to retain Form 325 to permit the public to monitor operators' compliance with the Commission's leased access, must carry, and horizontal concentration rules).

¹⁴ 5 U.S.C. § 533(b).

¹⁵ *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995) (quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)).

¹⁶ Both Commissioner Powell and Commissioner Furtchgott-Roth question the Commission's need for the data, and point out that the *Form 325 Order* does not identify a specific statutorily-based purpose for the

commented on these matters, in and of itself, suggests that the Commission failed to provide interested parties notice sufficient to afford them a reasonable opportunity to participate in the rulemaking process, as section 533(b) requires.¹⁷

The additional reporting obligations adopted in the *Form 325 Order* also do not satisfy the notice requirement in section 533(b) of the APA as a “logical outgrowth” of the proposals in the *Notice*. For a rule to constitute a “logical outgrowth” of an agency proposal, the rule must be sufficiently related to the proposal that a party, “*ex ante*, should have anticipated that such a requirement might be imposed.”¹⁸ For the reasons stated above, no one reasonably could have foreseen that the Commission might expand Form 325, let alone expand the form in the manner it did.¹⁹ As such, the amendments do not satisfy the “logical outgrowth” standard.

data once collected. *See Dissenting Statement of Commissioner Harold Furchgott-Roth* (“[T]he collection of this information is not statutorily required, nor does the item identify any specific, statutorily-based purpose for this information once collected. As I have said in other contexts, we should not compile data for its own sake.”); *Dissenting Statement of Commissioner Michael Powell* (“[T]here is no statutory requirement that the Commission collect the information required by this form. Indeed, . . . the Commission has not collected the information since 1994. . . . [Consequently], I find it hard to accept the assertions of the order, that there is an actual need for the Commission to reimpose this regulatory burden on any cable operator.”).

¹⁷ *See Shell Oil Co. v. EPA*, 950 F.2d 741, 761 (D.C. Cir. 1991) (holding that EPA’s “fail[ure] to identify even one comment recommending (or opposing)” its proposal “reinforce[s] our conclusion that notice was inadequate”).

¹⁸ *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 446 (D.C. Cir. 1991) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

¹⁹ The Commission’s request for comment on “any changes that should be made to clarify and improve the usefulness of the data collected . . . if Form 325 is retained” (*Notice*, 13 FCC Rcd at 12268) did not reasonably afford interested parties with notice that the Commission might add to the reporting requirements in Form 325. That request was specifically couched in terms of “how” the Commission could “obtain more useful consistent or reliable data” (*id.*), and therefore in terms of how the *process* should be changed, not whether the types of data collected should be expanded. But even if that request could be construed as suggesting that the Commission might expand the reporting requirements, it did not reasonably apprise interested parties that the Commission might expand the information collection requirements to include whole new areas of information – including information concerning cable modem and telephony services.

III. The Rationales Offered to Support Expansion of Form 325 Do Not Justify the Commission's Action.

The rationales offered to support retention and expansion of Form 325 in no way justify the Commission's action. In the first place, the Commission's claimed need for Form 325 information to formulate Commission policy rings hollow since it has not collected that information since 1994. As Commissioners Powell and Furtchgott-Roth point out, that fact alone undermines any assertion of actual need for it.²⁰ More importantly, however, the Commission does not, in fact, rely on such information in making policy decisions. To the contrary, when it embarks on a rulemaking proceeding to establish Commission policy it always asks interested parties to submit specific, relevant information. The type of information collected by Form 325 simply is no substitute for the detailed, targeted information the Commission needs to formulate policy.

The particular justifications offered for specific data collection requirements in the *Form 325 Order* fare no better. For example, the Commission claims, at para. 23, that the new Form 325 will still provide a mechanism for overseeing and auditing compliance with the Commission's regulatory fee requirements. The Commission, however, has successfully collected regulatory fees over the past five years without Form 325 data. In addition, the vast majority of cable operators will not even have to file Form 325. Consequently, the Commission could not possibly rely on Form 325 to oversee and audit compliance with regulatory fee requirements. Moreover, if an operator is brazen

²⁰ Dissenting Statement of Furtchgott-Roth ("the fact that we have not collected this information for the last four years undermines the assertion of actual need for it"); *see also* Dissenting Statement of Commissioner Powell ("Under these circumstances [*i.e.*, that the Commission has not collected Form 325 information since 1994], I find it hard to accept the assertions of the order, that there is an actual need for the Commission to reimpose this regulatory burden on any cable operators.").

enough to “cook the numbers” on its fee payment form, and to certify under penalty of perjury as to its accuracy, there is no reason to assume that it will report accurately on Form 325.

Likewise, the Commission claims, at paras. 21-22, that information pertaining to the channels devoted to leased access and must carry is necessary to enable the Commission to assess compliance with the horizontal integration, must carry and leased access rules. Again, however, the Commission has monitored and enforced these rules over the past five years without collecting Form 325 data. The Commission, for example, enforces compliance with the must carry and leased access rules through well-defined complaint procedures, and can easily track compliance with these rules simply by examining its own records. Additionally, cable operators are required to maintain a list of channels carried pursuant to the must carry rules in their public files, and to provide leased access rate information upon request. Consequently, the Commission and interested parties already have access to all the information they need to monitor compliance with the must carry and leased access rules.

The Commission also requires any person or entity holding an attributable interest in cable systems reaching 20 percent or more of homes passed nationwide that acquires attributable interests in additional cable systems to submit a certification specifying the number of homes passed before and after the acquisition.²¹ Consequently, Form 325 is unnecessary to monitor compliance with the horizontal integration requirements.

²¹ *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, MM Docket No. 92-264, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 FCC Rcd 14462, 14492 (1998) (lifting the stay on enforcement of 47 C.F.R. § 76.503(c) insofar as it requires persons or entities holding an attributable interest in cable systems reaching 20 percent or more of homes passed nationwide to inform the Commission when such persons or entities acquire additional cable systems).

Form 325 also is unnecessary to assist the Commission in preparing its annual cable competition report, as the Commission asserts (para. 232). If it were, the Commission would have collected Form 325 data sometime during the past five years. The fact that it did not and was, nevertheless, able to produce rigorous analyses of the state of cable competition every year is testimony to the fact that Form 325 is not necessary for this purpose. And, as Commissioner Powell aptly observes, the proposition that Form 325 is necessary to assist the Commission in preparing the cable competition report is undermined by “the fact that the Commission conducts a separate proceeding to collect information for that report,” and “is even more questionable since the information collected [on Form 325] will only be obtained from select cable systems.”²²

For the same reasons, there is no merit to the Commission’s claim that information concerning the provision of digital services is necessary to enable the Commission to analyze cable operators’ technical capabilities and the systems’ technical potential to offer sophisticated services. Not only does the Commission fail to articulate a statutory basis for collecting such information, it also offers no explanation why it cannot obtain such information in a less obtrusive and burdensome manner. Moreover, in light of the Commission’s avowed intent not to regulate advanced services provided via cable, it is difficult to comprehend why it needs such information.²³

²² Dissenting Statement of Commissioner Powell.

²³ See Remarks of William E. Kennard, Chairman, Federal Communications Commission, Before the National Cable Television Association, June 15, 1999 (“So with competition and deregulation as our touchstones, the FCC has taken a hands-off, deregulatory approach to the broadband market.”).

Consequently, the Commission has not even come close to justifying retention, let alone expansion, of Form 325, even assuming the Commission gave sufficient notice that it might expand the reporting requirements of Form 325, which it did not.

IV. Even if the Commission Were to Require Cable Operators to Submit the New Form 325 Data, It Should Permit Operators to Submit that Data on a Confidential Basis.

As discussed above, the simple fact that no interested parties commented upon the new reporting requirements in Form 325 requires the Commission to rescind those requirements pending a new rulemaking proceeding. However, the Commission's failure to provide interested parties a reasonable opportunity to comment on those requirements is exacerbated by the fact that much of the new data required by Form 325 is competitively sensitive and highly confidential, business information.

For example, requiring a cable operator to disclose the number of set-top boxes (analog, digital, or hybrid) it has deployed would confer a significant competitive advantage on its competitors by permitting them to determine how successfully the operator has marketed set-top box technology and attendant services. Likewise, requiring disclosure of information concerning the number of cable modem subscribers would give competitors valuable information concerning the success or failure of various cable modem deployment strategies. And forcing a firm to disclose information concerning the deployment of two-way services and other advanced technologies (such as digital transmission methodologies) would give its competitors competitively significant information concerning the firm's upgrade of its cable plant and rollout of advanced services. Armed with such information, competitors could quickly copy successful cable

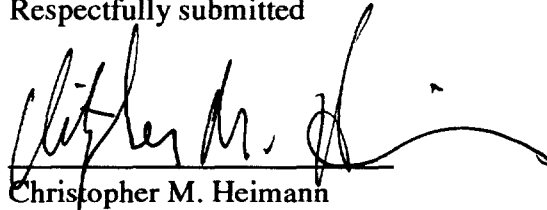
modem, set-top box, and advanced services deployment strategies with little risk of failure.

Requiring cable operators to disclose the new data required by Form 325 therefore would dampen significantly their incentives to deploy innovative technologies and services because of the risk that any success will be replicated immediately by competitors. For this reason, in competitive markets, firms do not disclose to competitors information concerning the success or failure of their service offerings and marketing strategies. Thus, even if the Commission ultimately were to conclude that it needs some of the new data required by Form 325, it should permit cable operators to submit that data on a confidential basis.

V. Conclusion.

Based on the foregoing, the Commission must rescind the new reporting requirements in Form 325 pending a proper notice and comment rulemaking proceeding to consider the need and statutory basis for such requirements, as well as to consider whether cable operators should be permitted to submit such information only on a confidential basis.

Respectfully submitted

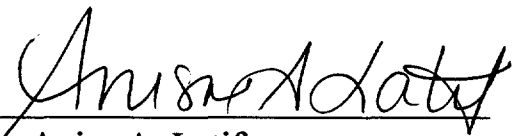
A handwritten signature in black ink, appearing to read "Christopher M. Heimann", with a long, sweeping horizontal flourish extending to the right.

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June 24, 1999

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of **Ameritech Petition for Reconsideration** has been served on the parties attached via first class mail – postage prepaid on this 24th day of June 1999.

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